pursuant to Court order

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000226
& 2013-SC-000824

COMMONWEALTH OF KENTUCKY **APPELLANT/CROSS-APPELLEE**

v. **APPEAL FROM PENDLETON CIRCUIT COURT**
HON. JAY B. DELANEY, JUDGE
INDICTMENT NO. 10-CR-00076

FLOYD WRIGHT **APPELLEE/CROSS-APPELLANT**

BRIEF FOR APPELLEE/CROSS-APPELLANT, FLOYD WRIGHT

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Jay B. Delaney, Judge, Courthouse, 233 Main Street, Falmouth, Kentucky 41040; the Hon. Michael W. Laws, Assistant Commonwealth's Attorney, 130 S. Main Street, Cynthia, Kentucky 41031; the Hon. Robert Hengge, Trial Attorney, 22 Forest Avenue, Suite 2, Fort Thomas, Kentucky 41075; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on July 16, 2014.

BRANDON NEIL JEWELL

INTRODUCTION

This is a case on discretionary review of the Opinion of the Kentucky Court of Appeals from the direct appeal of the final judgment in a criminal case in which Floyd Wright was convicted of complicity to first degree trafficking in a controlled substance and second degree persistent felony offender and sentenced to ten (10) years imprisonment. Mr. Wright is the Appellee/Cross-Appellant. The issues of which each party asked for review are delineated in the Statement of the Case (infra pg. 2-3) as is the capacity of each party as Appellant, Appellee, and Cross-Appellant.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Wright requests oral argument if this Court believes it would be helpful to the resolution of the case.

STATEMENT CONCERNING STANDARDS OF REVIEW/ PRESERVATION

Regarding a preserved federal constitutional error, reversal is required unless the error is proven harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Regarding preserved non-constitutional evidentiary errors, reversal is required unless the error was harmless. Such an error is harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. Winstead v. Commonwealth, 283 S .W.3d 678, 688-89 (Ky. 2009) (citing Kotteakos v. United States, 328 U .S. 750, 765 (1946)). "The inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had a substantial influence. If so, or if one is left

in gave doubt, the conviction cannot stand.'" Winstead, 283 S.W.3d at 689 (quoting Kotteakos, 328 U .S. at 765).

Regarding unpreserved errors, RCr 10.26 and KRE 103 allow reversal based on an unpreserved, palpable error when a manifest injustice occurs. This has been characterized in a number of ways. For example, when an error threatened a defendant's entitlement to due process of law, Allen v. Commonwealth, 286 S .W.3d 221, 226 (Ky. 2009), when the error seriously affected the fairness of the proceedings, Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005), when the defect in the proceeding was shocking or jurisprudentially intolerable, Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006), and when a reviewing court determines there is a substantial possibility that the result in the case would have been different but for the error. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

In accordance with CR 76.12(4)(c)(iv), Mr. Wright has noted at the beginning of each Argument Section whether it is preserved. The issues in each Argument Section herein are argued under the appropriate standard. However, to avoid repetition, counsel will reference this statement in each Argument Section instead of giving a full explication of the underlying case law regarding preservation and standards of review.

CITATIONS TO THE RECORD

The record consists of one (1) volume of Transcript of Record. This is cited to as TR with the page number immediately following; e.g., Transcript of Record page eleven (11) would be referred to as (TR, 11). The audiovisual record is cited in conformity with CR 98(4)(a).

STATEMENT OF POINTS AND AUTHORITIES

CROSS-APPELLANT'S STATEMENT OF THE CASE/ APPELLEE'S COUNTER STATEMENT OF THE CASE

After Sean Records sold Sherri Klups 1.23 grams of crack cocaine in Sean's living room, Mr. Wright was convicted of complicity to first-degree trafficking in a controlled substance. VR No. 1: 3/11/11; 2:24:02; TR 65-66.

At trial, Sean was required to testify truthfully as part of a plea agreement. VR No. 1: 3/11/11; 2:40:33-2:41:00. Sean testified that Mr. Wright had nothing to do with the drug deal. Id. at 2:39:30-2:40:33, 2:41:33-2:41:43. Mr. Wright just happened to be at Sean's home when Sherri (who was acting as a confidential informant) stopped by, without warning, wanting to buy drugs from Sean. Id.

During the drug deal, Sherri only spoke to and dealt with Sean. Id. at 2:01:45-2:00:52. However, she testified that she believed "it was like [Mr. Wright] was right there part of it" because Mr. Wright watched what happened, because he had been in the kitchen at the same time as Sean, and because he said something about the cocaine having been in the freezer after she asked Sean why it was cold. Id. at 2:10:45-2:11:55, 2:12:21.

A police officer improperly told jurors that Sherri was credible. Id. at 10:56:02-11:57:66, 11:04:12-11:05:11. He also improperly interpreted an audio recording of the drug transaction that jurors had difficulty understanding. Id. at 11:20:53-11:21:50. He improperly told jurors that Mr. Wright had "clearly, clearly" made incriminating statements on the recording. Id.

During deliberations, jurors returned to the courtroom trying to hear what was actually said on the recording. Id. at 3:45:20. With the trial court's approval, they later used the prosecutor's laptop in the deliberation room to further listen to the recording. Id.

at 4:46:45. The prosecutor admitted that the laptop may contain inadmissible evidence regarding the case that jurors could access. Id. at 3:43:25-3:45:20. However, the trial court gave no admonition to the jury limiting their use of the prosecutor's laptop.

Thereafter, the jury returned a guilty verdict on complicity to first degree trafficking in a controlled substance and second degree persistent felony offender. TR 65-66. They recommended the minimum enhanced sentence of ten (10) years imprisonment. Id. The trial court followed the recommendations and entered final judgment on April 13, 2011. Id. Mr. Wright appealed as a matter of right and argued that reversal was required because 1) Mr. Wright was entitled to a directed verdict, 2) that the officer improperly interpreted the audio recording of the drug transaction at trial, 3) that the officer improperly bolstered and vouched for informant Sherri Klups' reliability and credibility at trial, 4) that Sherri Klups expressed improper opinion testimony regarding guilt, the meaning of what Mr. Wright said, and Mr. Wright's mental state at trial, 5) that the prosecutor made improper comments in closing argument, 6) and that the jury should not have been allowed to use the prosecutor's laptop in the deliberation room without limitation and without any admonitions. Ky. Const. §115.

The Kentucky Court of Appeals reversed Mr. Wright's case on the grounds that the jury was allowed unfettered access to the prosecutor's laptop in the jury room to listen to an audio recording that had been played during trial. Wright v. Commonwealth, Slip Opinion pg. 3-5. While not reversing on other grounds, the Court of Appeals also found that the officer improperly interpreted the audio recording for the jury and improperly bolstered and vouched for informant Sherri Klups' reliability and credibility. Id. at 8-12.

Subsequently, the Commonwealth asked this Court to grant discretionary review to review the issue regarding the jury using the prosecutor's laptop and the motion was granted. Thereafter, Mr. Wright asked this Court to grant cross-review to review whether reversal was also required because 1) Mr. Wright was entitled to a directed verdict, 2) because the officer improperly interpreting the audio recording of the drug transaction for the jury, 3) because the officer improperly bolstered and vouched for informant Klups' reliability and credibility, and 4) because Klups expressed improper opinion testimony regarding guilt, the meaning of what Mr. Wright said, and his mental state. Mr. Wright's motion was granted.

Mr. Wright now presents these arguments in his capacity as Cross-Appellant and responds to the Commonwealth's sole argument regarding the jury using the prosecutor's laptop in the deliberation room in his capacity as Appellee.

Facts will be expanded upon further herein to avoid repetition.

ARGUMENT

I.

Mr. Wright was entitled a directed verdict of acquittal.

Preservation:

Mr. Wright moved for a directed verdict motion at the close of the Commonwealth's case-in-chief. VR No. 1: 3/11/11; 2:29:20-2:30:52. Mr. Wright contends below this is sufficient for preservation in this particular case but alternatively asks this Court to review the issue under RCr 10.26.[1] This contention and alternative request will be expanded upon below.

[1] See STATEMENT CONCERNING PRESERVATION/STANDARD OF REVIEW. Supra at pg. i-ii.

Facts:

After Sherri Klups became a confidential informant[2], Officer Arnsperger directed her to go to Sean Records' home on August 6, 2008 and purchase drugs from Sean. Id. at 11:03:01-11:04:17. Sherri's testimony regarding whether she knew Sean prior to this occasion was evasive, contradictory, and confusing. Id. at 11:49:40-11:50:51, 1:46:13-1:49:50, 2:04:00-2:05:10). Ultimately, it became discernable, through leading questions, that the prosecutor's story was that Sherri had conducted three undercover buys from Sean and at least two of these buys were at Sean's home. Id. at 2:07:00-2:10:45. The only time Mr. Wright was around was during the incident at issue. Id. at 2:47:40-2:49:30.

When Sherri went to Sean's home on August 6, she knocked on the door and somebody inside asked who was there. Id. at 11:51:38-11:51:50. She said "it's Sherri, is Sean home?" Id. Sean opened the door and Sherri walked inside into a small living room. Id. at 11:52:30-11:53:19. She saw Mr. Wright, who she did not know, and a female sitting on a couch. Id. at 11:53:59-11:54:45. Sherri asked Sean if he had any pills or heroin. Id. at 11:54:49-11:55:06. Sean told her he did not, but he told her he had some crack cocaine. Id. Sherri told Sean she would like to see it. She testified that Sean and Mr. Wright went into the kitchen at the same time. Id. 11:55:21-11:55:59. She stayed in the living room. Id. at 11:56:20. Sherri could not see into the kitchen because a curtain covered the kitchen doorway. Id. at11:53:31. She could not distinguish anything said by

[2] Prior to becoming a confidential informant, Sherri got caught with drugs and coincidently realized she had a problem. The arresting officer, Detective Arnsperger, told her he could help. He told her **he** would not convict her if she conducted undercover drug buys for him. She did not testify whether becoming a confidential informant was part of any recovery program or whether she received any true help for her problem. Rather, she testified that she had just gotten divorced and said "I just was wanted the charges gone, I didn't want to go to jail, I had three kids to raise." VR No. 1:3/11/11; 11:43:33-11:45:40.

Sean or Mr. Wright on the other side of the curtain but said she thought she heard them talking, baggies being handled, and a freezer or refrigerator door open. Id. at 11:56:20-11:57:10, 1:53:11-1:53:22.

At one point Sherri said they were gone for 2 to 3 minutes and at another point she said they were gone 5 to 8 minutes. Id. at 12:06:23-12:06:33, 1:52:44-1:52:52. In any event, they eventually came back into the living room. Sean had the cocaine and sold it to Sherri for $35. Id. at 11:59:50, 12:00:58-12:01:02, 12:02:40-12:12:03:09. Sherri testified the cocaine was mushy and cold and asked why. Id. at 12:01:11-12:02:40-12:12:03:09. Sean told her to trust it because it was very good and that he had gotten it from his drug dealer, an African American man in Cincinnati, earlier that day. Id. at 12:01:11-12:01:38, 1:57:05-1:57:44. Sean said he had put it in his pants on the way home and that it had gotten hot and started to melt. Id. Sherri testified that Mr. Wright said "that they had put it in the freezer." Id. at 12:02:27-12:02:40. At another point, she claimed Mr. Wright had rather said "we had stuck it in the freezer for a few minutes to get it...," and at another point that Mr. Wright had rather said "it had been put in the freezer to cool down." Id. at 12:01:38-12:01:51, 1:57:30-1:57:40.

In any event, Sherri testified that the only thing Mr. Wright said was this one statement which was something about the cocaine having been in the freezer. Id. at 2:00:45-2:00:52.

Sherri tried to justify the prosecutor's opinion that she had purchased from Sean and Mr. Wright jointly (which she claimed several times in response to the prosecutor's leading questions) by saying Mr. Wright was "monitoring" or "watching" what happened and "it was like he was right there part of it." Id. at 2:12:21-2:12:35. She reluctantly

admitted that it is possible that Sean was the only one in the kitchen messing with baggies. Id. at 1:58:29-1:58:49.

After the close of the Commonwealth's case-in-chief, Sean testified. He testified that Mr. Wright had nothing to do with the drug deal between him and Sherri. Id. at 2:39:30-2:40:33, 2:41:28-3:41:34, 2:41:40-2:42:12. He testified that he had pled guilty to drug offenses for selling drugs to Sherri on three different occasions and that part of his plea agreement was that he had to testify truthfully in Mr. Wright's trial. Id. at 2:40:33-2:41:00, 2:47:40-2:49:09. He testified that he had gone to Cincinnati prior to Sherri coming over and purchased the cocaine from his drug dealer. Id. at 2:33:01-2:33:30, 2:39:35-2:39:55, 2:43:33-2:43:41. On the way home, his car overheated and he stopped at his fiancé's parent's house. Id. at 2:33:30-2:33:50. He called Mr. Wright, a friend of his since childhood, and asked for a ride home. Id. Mr. Wright picked him up and took him home. Id. Sean told Mr. Wright he was in a hurry because he had to put something in the freezer and offered Mr. Wright gas money. Id. at 2:33:50-2:34:33, 2:44:14-2:44:25. When they got to his home, Mr. Wright came in to drink some beer in lieu of gas money. Id. Sean put the cocaine in his freezer. Id. at 2:33:50-2:34:33.

Sean testified that Sherri came beating on his door a while later. Id. at 2:35:30-2:36:03. He testified that he knew her because he had sold her drugs 8 or 9 times. Id. He testified that Sherri came in and asked for drugs and he told her he had crack cocaine in the freezer. Id. He testified that Mr. Wright went into the kitchen just before he did and grabbed a beer and went through another door to a bathroom a few rooms away while he (Sean) got scales and baggies out and packaged the cocaine. Id. 2:36:03-2:37:15. He testified that Mr. Wright came back as he finished up and they went back into the living

room. Id. Sean admitted that Mr. Wright saw him get the cocaine out of the freezer and saw him sell it to Sherri. Id. at 2:39:10-2:39:32. However, he testified that Mr. Wright did not help him obtain the cocaine, did not help him sell it, did not help him plan the sale, and that he (Sean) did not even know Sherri was coming over to buy drugs until she knocked on his door. Id. at 2:39:32-2:40:31.

Law and Analysis:

The Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Kentucky Constitution demands that no accused shall be convicted of a crime unless the prosecution proves every element in the offense charged beyond a reasonable doubt, and this burden of proof remains with the prosecution throughout the trial and can never be shifted to the accused. Miller v. Commonwealth, 77 S.W.3d 566, 576 (Ky. 2002) (citing In re Winship, 397 U.S. 358, 364 (1970); Perkins v. Commonwealth, 694 S.W. 2d 721 (Ky. App 1985); KRS 500.070(1)); Ky. Const. §§ 2, 11; see also Jackson v. Virginia, 443 U.S. 307 (1979).

When the prosecution does not meet the burden of proof outlined above, an accused is entitled to a directed verdict of acquittal. Hon v. Commonwealth, 679 S.W.2d 851, 853 (Ky. 1984) and Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). That is:

> With the evidence viewed in the light most favorable to the Commonwealth, if the totality of the evidence is such a that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury. If the evidence cannot meet this test it is insufficient and a directed verdict of acquittal should be granted.

Sawhill, 660 S.W.2d at 5 (citing Hodges v. Commonwealth, 473 S.W.2d 811 (Ky. 1971) and Bailey v. Commonwealth, 483 S.W.2d 112 (Ky. 1972)).

When preserved, the standard of appellate review regarding sufficiency of the evidence is whether under the evidence as a whole it would be clearly unreasonable for a jury to find an accused guilty beyond a reasonable doubt; if so, a defendant should have been granted a directed verdict of acquittal. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Because no evidence favorable to the Commonwealth was presented after the close of the Commonwealth's case when the directed verdict motion was made, Mr. Wright contends the Benham standard should apply. However, if this Court disagrees and finds that evidence favorable to the Commonwealth was presented after the directed verdict motion, or that evidence necessary for reversal was presented after the directed verdict motion, Mr. Wright asks this Court to review this issue under RCr 10.26. Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009).

In the case at bar, the trial court instructed the jury in accordance with statute:

> You will find the Defendant guilty of Complicity to First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about August 6, 2008, and before the finding of the indictment herein, Sean Records unlawfully sold or transferred a quantity of Cocaine, a Schedule II narcotic controlled substance, to Sherri Klups;
>
> B. That Sean Records knew the substance being sold or transferred was Cocaine;
>
> AND
>
> C. That the defendant, Floyd Wright, with the intention of promoting or facilitating the commission of the above offense aided Sean Records in the commission of the offense.

(TR 39; see KRS 218A.1412 and KRS 502.020).

The prosecution was required to prove that Mr. Wright aided Sean Records with the intention of promoting or facilitating the drug deal. Although Officer Arnsperger interpreted the audio recording of the drug deal for jurors and told them that Mr. Wright clearly made incriminating statements and Sherri Klups said she believed "it was like [Mr. Wright] was right there part of it," such evidence was improper. (See Argument Sections II, III, and IV below).

Mr. Wright going to and from the kitchen about the same time as Sean Records and making a comment about the drugs having been in the freezer was the only evidence against him in this case. This evidence was not more than a scintilla of evidence of substance that Mr. Wright aided Sean Records with the intention of promoting or facilitating the drug deal. See Benham, 816 S.W.2d at 188-189 (citing Sawhill, 660 S.W.2d 3 (Ky. 1983)).

Rather than finding guilt based upon the evidence, the jury had to resort to suspicion or conjecture in making their finding, such is not sufficient evidence. See Trowel v. Commonwealth, 550 S.W.2d 530, 532 (Ky. 1977); Adkins v. Commonwealth, 230 S.W.2d 453, 455 (Ky. 1950). Moreover, a guilty verdict based upon insufficient evidence is a manifest injustice under 10.26.[3] Accordingly, Mr. Wright was entitled a directed verdict under the abovementioned authority.

In the event that this Court does not conclude that Mr. Wright was entitled a directed verdict, Mr. Wright asks that the case be reversed for a new trial for the reasons stated below.

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[3] Due process is violated when a conviction is obtained on the basis of insufficient evidence and "a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review." Schoenbachler v. Commonwealth, 95 S.W.3d 830, 837 (Ky. 2003), n. 9 and 10.

ARGUMENT

II.

Officer Arnsperger improperly interpreted an audio recording of the drug transaction that jurors had difficulty understanding.

Preservation:

This issue was not preserved in the trial court but was raised before the Court of Appeals. Mr. Wright asks that this issue be reviewed under RCr 10.26 and KRE 103.[4]

Facts:

The audio recording of the drug deal between Sherri and Sean was played at trial. VR No. 1: 3/11/11; 12:09:20-12:32:05, 1:39:00-1:43:05. Despite the recording not being as "clear" as Officer Arnsperger claimed, he told the jury the following:

> Prosecutor: And, at what point in time in the recording did you hear the defendant's voice?
>
> Officer: I have two listed down here **clearly, clearly** on the tape recorder, that when my informant, excuse me, that when my informant was questioning the substance, Mr. Records came out with the defendant from the kitchen, and when they handed, excuse me, when Sean Records handed the drugs to my informant, she started to feel it and question it like maybe it was a fake substance and she asked questions if it was warm, why is it warm, why is it mushy, and **the defendant, clearly on tape starts to explain how they put it in the freezer**..."

Id. at 11:20:53-11:21:50. Officer Arnsperger later told jurors:

> That happens to, you get people that, uh, bring the drugs and other people sell it. You got times when two people are involved in it and they whack it up together and sell it. Um, you've got some people that are the talkers and you've got some people who sit back and watch. It's kind of like I describe it as you've got one person who does something then you've got the hit man you know, and the hit man usually never says anything but sits and, and oversees the deal, **or maybe makes a few comments like the defendant did in the tape during the transaction.**[5]

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[4] See STATEMENT CONCERNING PRESERVATION/STANDARD OF REVIEW. Supra at pg. i-ii.

[5] This was not a case of a controlled drug buy involving two targets. Again, Sherri Klups randomly showed up at Sean's house to buy drugs. Mr. Wright just happened to be there at the time. She was not expected to be there by anyone at the home at the time.

Id. at 11:36:33-11:37:04).

Law and Analysis:

It was error for Officer Arnsperger to interpret the audio recording for the jury. While not reversing on this ground, the Court of Appeals agreed that the testimony was improper. Wright v. Commonwealth, Slip Opinion pg. 7-9.

Under KRE 602, a witness may not testify to a matter unless the witness has personal knowledge of the matter. While a witness who was present when recorded events occurred may "narrate," i.e., testify from personal recollection while the tape plays, he may not interpret what is on the tape. Gordon v. Commonwealth, 916 S.W.2d 176, 179–180 (Ky.1995) ("As with any participant in a conversation, the informant witness was entitled to testify as to his recollection of what was said ... it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error."). When a witness interprets what is on a tape, he impermissibly invades the province of the jury. Cuzick v. Commonwealth, 276 S.W.3d 260, 265–66 (Ky.2009).

In the present case, Officer Arnsperger was not present in Sean Records' home when Sherri Klups bought drugs from him and recorded the transaction. Accordingly, Officer Arnsperger could not "narrate" the recording. Further, Officer Arnsperger certainly could not interpret the recording or speculate about what was actually said on it. Gordon, 916 S.W.2d at 179. Thus, it was improper for Officer Arnsperger to tell jurors he could "clearly, clearly" hear Mr. Wright on the recording and that Mr. Wright "clearly on the tape starts to explain how they put [the drugs] in the freezer..." Again, it is "for the

jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." Id. at 180.

Prejudice:

After the jury was sent to deliberate, they returned to the courtroom wanting to listen to the audio recording again. Id. at 3:41:40. The trial court asked, "[i]s there a particular portion that you all spoke about that you wanted to hear?" A juror responded:

> Yes, the portion where it said, um, word for word what he says, um, and it was in the freezer. We'd like to hear word for word what it says because it does make a big difference. Um, I believe the, um, the witness was stating that they, that she said they had it in the freezer, it does make a big difference if it insinuates himself as we had it in the freezer or it was in the freezer.

Id. at 3:4524-3:45:50. After listening to the tape in the courtroom further and returning to deliberate, the jury eventually sent a note out saying "[w]e need the audio recording in here to prove there are 2 different male voices interacting on the recording. It was too loud to hear."[6] Id. at 4:46:45-4:47:11, TR 47.

Mr. Wright does not believe the recording is nearly as "clear" as Officer Arnsperger claimed. It is reasonable to conclude jurors did not either because of how many times they listened to the recording. It is likely jurors could not understand what was actually said on the recording and thus relied on Officer Arnsperger's interpretation because an "officer's testimony often carries a special aura of reliability." State v. King, 219 P.3d 642, 646 (Wash. 2009) (quoting State v. Kirkman, 155 P.3d 125 (Wash. 1997)).

As this case seemed to hinge on exactly what Mr. Wright said during the transaction, Officer Arnsperger telling jurors that Mr. Wright clearly made incriminating

[6] In response, they were given the prosecutor's laptop so that they could listen to it on their own in the deliberation room. (See Argument Section V regarding error in giving jury prosecutor's laptop to continue listening to the recording in the deliberation room).

statements could have easily been what swayed the jury to find him guilty. This is was especially prejudicial when combined with the fact that there was not overwhelming evidence of guilt and that Officer Arnsperger also improperly told jurors Sherri was credible right before Sherri improperly expressed her opinion that Mr. Wright's comment about the drugs being in the freezer was meant as an attempt to induce her to buy the drugs and that she believed Mr. Wright was complicit in the deal.[7] (See Argument Sections II and III).

This error also violated Mr. Wright's rights to be tried by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Mr. Wright's rights to a fair trial, fundamental fairness, and Due Process under the Fifth and Fourteenth Amendments to the United States Constitution. See State v. Kirkman, 155 P.3d 125 (Wash. 2007) (Impermissible opinion testimony is reversible error when such evidence violates the defendant's constitutional right to a jury trial by interfering with the independent determination of the facts by the jury.); See also Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988) (Granting federal habeas corpus relief due to state evidentiary rule violation: police officer essentially testified he believed a defendant was guilty, resulting in the denial of fundamental fairness, thereby violating due process.) (citing Maglaya v. Buchkoe, 515 F.2d 265 (6th Cir. 1975)); see also Payne v. Tennessee, 501 U.S. 808, 825 (1991) (When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause provides a mechanism for relief"); Alexander v. Louisiana, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. amend 5 right to a fair trial to the states.); California v.

[7] See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (Due process clause affords criminal defendants "fundamental fairness."). See also, Sections 2, 7, and 11 of the Kentucky Constitution.

Conclusion:

This error violated KRE 602, Kentucky case law, and Appellant's rights to be tried by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Mr. Wright's rights to a fair trial, fundamental fairness, and Due Process under the Fifth and Fourteenth Amendments to the United States Constitution. This error was also palpable as the Kentucky Rules of Evidence and this Court has made clear that such testimony is improper and, as explained above, it also seriously affected the fairness of the proceeding, especially when combined with the other errors, and there is a substantial possibility that the result in the case would have been different but for the errors. Reversal is also required due to this improper testimony.

ARGUMENT

III.

Officer Aaron Arnsperger improperly bolstered and vouched for informant Sherri Klups' reliability and credibility at trial.

Preservation:

This issue was not preserved in the trial court but was raised before the Court of Appeals. Mr. Wright asks that it be reviewed under RCr 10.26 and KRE 103.[8]

[8] See STATEMENT CONCERNING PRESERVATION/STANDARDS OF REVIEW. Supra at pg. i-ii.

Facts:

During direct examination of Officer Aaron Arnsperger, the Officer testified that he had "done a lot" of work with street level narcotics operations. VR No. 1: 3/11/11; 10:56:02-10:56:08. When asked what that consists of, Officer Arnsperger told jurors:

> "It would consist of taking an informant, and the most important thing is while that informant is actually working with you that they're being honest. And that's why you follow up with tape recorders you keep in visual contact by watching (inaudible) with binoculars or following in a vehicle maybe 100 yards away from them, but, you, you keep contact with an informant. **An informant is somebody you can use that's credible. If they're not credible, and I've worked with informants that aren't credible, and we don't charge the people, we get rid of those informants, and uh, it's somebody we have to trust and somebody we monitor very closely.**"

Id. at 10:56:20-10:56:51. Officer Arnsperger then testified that:

> "A cooperating witness[9] would be somebody you have had contact with in your official duties as a police officer and they would become a willing participant and become cooperative with you in another investigation, basically giving you information, **that has to be credible information**, we don't just say hey Joe Blow did this and just you go and charge somebody, it doesn't work that way. So, **you have to find them credible** and the evidence has to back up their statements and again that's why we have a recorder, 'cause I know in society you can't just trust everybody.

Id. at 10:57:15-11:57:66.

Officer Arnsperger then testified "Sherri Klups is my undercover informant." Id. at 10:59:38-10:59:44. When asked if he worked with her in 2008, the Officer responded:

> "Yes, I did, for quite a while. We had a long investigation going with numerous people for different types of drugs, heroin, crack cocaine, cocaine, some serious pills, we bought some marijuana and stuff like that, but I've worked with her for quite a bit of time."

Id. at 10:59:48-11:00:03.

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[9] The terms "confidential informant," cooperating witness, and "undercover informant" were used interchangeably during the proceedings. Appellant uses the term "confidential informant" throughout this brief for consistency except when directly quoting an individual's words at trial.

The prosecutor later reemphasized this testimony and asked "... you worked with Sherri on a number of occasions as a cooperating witness?" Id. at 11:02:36-11:02:39. Officer Arnsperger responded:

> "**Numerous**, we ran around Pendleton County and found (inaudible) all different times of the night, rain and, at all different types of the hour, and had hundreds of phone conversations and taped recorded conversation, and' um, worked with her quite a bit."

Id. at 11:02:40-11:02:56.

When asked if he sent her to Sean Records' home on August 6, 2008 and what she was supposed to do there, Officer Arnsperger told jurors:

> "Correct, she was gonna make a contact with Mr. Records and, um, hopefully buy some illegal drugs that we feel clearly were going on in that residence, wired her up, gave her the money searched her searched her vehicle, and the reason we do that is again you have to have that **credibility** there. It doesn't really matter what happened prior to in her personal life, but **if she's not credible for the court or for me or for our police department it's not gonna happen**. I met her, searched her stuff I didn't find any narcotics or drugs, I turned on the recorder and we have a way of locking the recorder where it stays on the entire time, so my conversation with her is recorded and I sent her on her way and I kept a visual what we call visual contact with her from either one binoculars or I followed her in that old junky black truck, it didn't run that well at the time but it stayed running, and I followed her to the drug house"

Id. at 11:04:12-11:05:11.

Officer Arnsperger also told jurors that he sent Sherri "to several different drug houses around town" the day he sent her to Sean's house. Id. at 11:04:01-11:04:09. He testified that the drug buy at Sean's home "was part of a larger operation" that involved approximately 20 drug buys and that eight different individuals were arrested from eight different "drug houses." Id. at 11:22:41-11:23:23.

Law:

In the case at bar, testimony characterizing Sherri as reliable and credible was inadmissible. Reliability and credibility are character traits. Under KRE 404(b), evidence "of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." KRE 404(a)(3) further provides that the character of a witness is not admissible except as provided in KRE 608.

KRE 608(a) provides:

> The **credibility** of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible **only after** the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (emphasis added).

Id. (Emphasis added). In other words, the credibility of a witness may be attacked or supported by opinion or reputation evidence of truthful character, and only if the evidence refers to character for truthfulness, and **only after** the character of the witness for truthfulness has been attacked.

KRE 608(b) concerns specific instances of conduct:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility.... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which the character the witness being cross-examined has testified.

In Fairrow, this Court interpreted KRE 404 and KRE 608, and discussed the interplay between the rules. Fairrow v. Commonwealth, 175 S.W.3d 601 (Ky. 2005). In that case, the defendant was charged with two counts of trafficking in a controlled substance after the police used a confidential informant to make "a controlled drug buy."

The police equipped the informant with an audiotape to secretly record the transaction and furnished her with thirty dollars in cash. Each time the informant purchased cocaine from the defendant. Id, at 604.

At trial, the prosecutor asked the Officer responsible for arranging the controlled buy: whether the informant had been reliable in the past, how many cases the informant had worked on for the Officer in the past, and whether the cases that she worked had "positive results." This Court held that the testimony that the informant "was a reliable informant whose work had always resulted in convictions was inadmissible character evidence under KRE 404(a)." Id, at 605. This Court remarked: "The rule states that 'evidence of a person's character or trait of character **is not** admissible for the purpose of proving action in conformity therewith on a particular occasion." Id, at 605 (emphasis added).

This Court further ruled that the exceptions provided in KRE 608(b) regarding evidence of credibility were not applicable. One reason was because the testimony was elicited during the direct examination of the Officer, not during cross-examination. Id, at 606. Another reason was that KRE 608 leaves no room for proof of anything other than truthfulness or untruthfulness, and the Officer "was not referring to [the informant's] truthfulness as a witness but to her 'reliability' as an informant." Id. Yet another reason was that the bolstering testimony was elicited before the credibility of the witness had been attacked. Id. This Court concluded: "Obviously, admission of this testimony constituted error." Id.

Analysis:

Officer Arnsperger's testimony in this case amounted to an improper declaration that Sherri was a credible and a reliable informant. This was inadmissible character evidence under KRE 404(a). Even if this testimony could be solely characterized as evidence of credibility, or "truthful character," such is still character evidence that is inadmissible under KRE 404. Moreover, such evidence is also inadmissible under KRE 608. Evidence of "credibility," or "truthful character," is only admissible after the character of the witness for truthfulness has been attacked, and such evidence cannot be proven by specific instances of conduct on direct examination. In the case at bar, Officer Arnsperger's testimony was introduced during direct examination[10] and Sherri's credibility had not been attacked, and never was during the rest of the trial. Moreover, Officer Arnsperger referenced specific instances when he told jurors that she had worked as an informant numerous times and that this drug bust was part of a larger operation that involved approximately 20 drug buys and that eight different individuals were arrested from eight different houses. Id.

However one categorizes it, Officer Arnsperger clearly vouched for Sherri's credibility and "it is well settled that a witness cannot vouch for the credibility of another witness." Bell v. Commonwealth, 245 S.W.3d 738, 745 (Ky. 2008), overruled on other grounds by Harp v. Commonwealth, 266 S.W.3d 813 (Ky. 2008).

While not reversing on this ground, the Court of Appeals agreed that Officer Arnsperger's testimony amounted to an improper declaration that the informant was

[10] Officer Arnsperger's was the first witness in the case and much of his testimony regarding Sherri's credibility was offered in the first few minutes of his testimony.

credible and reliable and was inadmissible character evidence. Wright v. Commonwealth, Slip Opinion pg. 11-12.

Prejudice:

This error was palpable. As the Court of Appeals stated in its Opinion, "Kentucky law is clear that 'the credibility of the witnesses must be determined by the jury.'" Id. quoting Davis v. Commonwealth, 111 S.W.2d 640, 647 (Ky. 1937).

The prejudice in Officer Arnsperger's testimony is it invaded the jury's function as the sole deciders of what weight to give the evidence and how credible a witness is. Jurors had no reason to doubt Officer Arnsperger's purported belief that Sherri was credible and reliable and they had every reason to accept his characterization of Sherri because an "officer's testimony often carries a special aura of reliability." State v. King, 219 P.3d 642, 646 (Wash. 2009) (quoting State v. Kirkman, 155 P.3d 125 (Wash. 1997)).

While the error in Fairrow was not found reversible, the prejudice in this case is more severe than that in Fairrow because there was not overwhelming evidence of guilt in this case as there was in Fairrow. Furthermore, Officer Arnsperger vouching for Sherri's credibility is more prejudicial than the vouching in Fairrow because of the fact that Sherri took the witness stand right after Officer Arnsperger and expressed her opinion that she believed Mr. Wright's comment about the drugs being in the freezer was meant as an attempt to induce her to buy the drugs and that she believed Mr. Wright was guilty. (See Argument Section IV below).

This error also violated Mr. Wright's rights to be tried by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Mr. Wright's rights to a fair trial, fundamental fairness, and Due Process under the Fifth and Fourteenth

Amendments to the United States Constitution. See State v. Kirkman, 155 P.3d 125 (Wash. 2007) (Impermissible opinion testimony is reversible error when such evidence violates the defendant's constitutional right to a jury trial by interfering with the independent determination of the facts by the jury.); See also Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988) (Granting federal habeas corpus relief due to state evidentiary rule violation: police officer essentially testified he believed a defendant was guilty, resulting in the denial of fundamental fairness, thereby violating due process.) (citing Maglaya v. Buchkoe, 515 F.2d 265 (6th Cir. 1975)); see also Payne v. Tennessee, 501 U.S. 808, 825 (1991) (When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause provides a mechanism for relief"); Alexander v. Louisiana, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. amend 5 right to a fair trial to the states.); California v. Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (Due process clause affords criminal defendants "fundamental fairness."). See also, Sections 2, 7, and 11 of the Kentucky Constitution

Conclusion:

The improper testimony regarding Sherri's credibility and reliability denied Mr. Wright a fair trial in violation of the above mentioned authority and his rights to be tried by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and his rights to a fair trial, fundamental fairness, and Due Process under the Sixth and Fourteenth Amendments to the United States Constitution. This error, especially when considered together and along with the lack of evidence of guilt, seriously affected the fairness of the proceedings and there is a substantial possibility that

the result in the case would have been different but for the errors.[11] Reversal is also required due to this error.

ARGUMENT

IV

Sherri Klups expressed improper opinion testimony regarding guilt, the meaning of what Mr. Wright said, and Mr. Wright's mental state.

Preservation:

This issue was not preserved in the trial court but was raised before the Court of Appeals. Mr. Wright asks that it be reviewed under RCr 10.26 and KRE 103.[12]

Facts:

After Officer Arnsperger told jurors Sherri Klups was credible, Sherri Klups took the stand and expressed her opinion that she believed Wright was guilty. She also expressed her opinion that Mr. Wright's comment about the drugs being in the freezer was meant as an attempt to induce her to buy the drugs, and her opinion that his mental state was such that he was making sure to listen to and see everything that happened when she bought drugs from Sean Records. (See Analysis Section below for citations to record).

Law:

"[A] witness generally cannot testify to conclusions of law." Tamme v. Commonwealth, 973 S.W.2d 13, 32 (Ky.1998) (citing Gibson v. Crawford, 259 Ky. 708, 722, 83 S.W.2d 1, 7 (1935)). Also, a witness's opinion that a defendant is guilty is not

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[11] See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

[12] See STATEMENT CONCERNING PRESERVATION/STANDARDS OF REVIEW. Supra at pg. i-ii.

admissible at trial. Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982) and Bussey v. Commonwealth, 797 S.W.2d 483, 485-486 (Ky. 1990).

A witness does not have to blatantly say "I believe the defendant is guilty" in order for a violation of these principles to occur. In Nugent, on re-direct examination of a prosecution witness, the trial court permitted introduction of that witness's written statement which essentially elicited his opinion about whether the defendant was guilty. 639 S.W.2d at 764. The Commonwealth argued it was permissible because the defense had put the witness's state of mind at issue when he cross-examined him regarding another part of the written statement, to show that the witness was "playing detective," and had opened the door. Id. This Court held that it was clearly erroneous to admit into evidence a witness's opinion as to a defendant's guilt because "[t]he issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even though a route which is, at best, "back door" in nature." Id., (citing Kennedy v. Commonwealth, 77 Ky. (14 Bush) 340 (1878), Koester v. Commonwealth, 449 S.W.2d 213 (Ky. 1969); Deverell v. Commonwealth, 539 S.W.2d 301 (Ky. 1976)).

In Bussey, "[o]n direct examination, Officer Shirley was asked whether he had come to a conclusion that the victim had been taken against his will to the scene where sexual abuse had occurred. He answered, 'Yes, I came to the conclusion that there had to have been some type of misconduct or I would not have received a complaint.'" 797 S.W.2d, 485. This testimony was admitted while the officer was explaining why he reported his findings to a captain to continue with an investigation. Id, at 485. This Court

concluded such testimony was improper and reversible error. Id, at 486 (citing Sanborn v. Commonwealth, 754 S.W.2d 534, 541 (Ky. 1988)).

A lay witness's opinion testimony is restricted to matters "'(a) [r]ationally based on the perception of the witness,' and '(b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue.'"[13] Cuzick v. Commonwealth, 276 S.W.3d 260, 265 (Ky.2009) (citing KRE 701). KRE 602 further limits lay testimony to matters of which the witness has personal knowledge. Generally, a witness may not testify to the mental impressions of another. Young v. Commonwealth, 50 S.W.3d 148, 170 (Ky. 2001) citing (Tamme v. Commonwealth, 973 S.W.2d 13, 33-34 (Ky. 1998) and Adcock v. Commonwealth, 702 S.W.2d 440, 442 (Ky. 1986)). Also, a witness should not attempt to interpret what another witness meant by what he said. Tamme, 973 S.W.2d at 33-34 (citing Adcock, 702 S.W.2d at 442).

Analysis:

Sherri only interacted with Sean when she bought the drugs at issue. She had no personal knowledge about whether Mr. Wright had anything to do with it. However, when the prosecutor asked her "[d]id you buy some dope from [Mr. Wright] that day?," she responded "[y]es." VR No. 1: 3/11/11; 11:42:51-11:43:03. When the prosecutor asked her, "... were you dealing with both of these individual's that day?," she responded "[y]es, I was." When the prosecutor asked her to clarify that those two individuals were "Mr. Records and [Mr. Wright]?," she responded "[y]es." Id. at 12:06:00-12:06:15. The prosecutor later asked "[o]ne more time, on August the 6th, Sherri, of 2008, um, did you, uh, buy cocaine, um, from these two individuals?" Sherri responded, "[y]es, I did." The

[13] Testimony regarding guilt is not useful for the jury to understand his testimony or determine a fact in issue. C.f. Stringer v. Commonwealth, 956 S.W.2d 883, 889-890 (Ky. 1997) (jurors presumably do not need assistance in the form of opinion that a defendant is guilty or not guilty from expert witnesses).

prosecutor again asked her to clarify that the two individuals were "Mr. Records and [Mr. Wright]?" She again said "[y]es." Id. at 1:43:41-1:44:00.

Sherri's responses expressed her legal conclusion that Mr. Wright was complicit in the drug deal, or, in other words, her opinion that Mr. Wright was guilty of complicity to trafficking in a controlled substance. While she did not say "it is my opinion that Mr. Wright is guilty," or "it is my legal conclusion that Mr. Wright was complicit," again, a witness does not have to blatantly say such. "The issue of guilt or innocence is one for the jury to determine, and an opinion of a witness which intrudes on this function is not admissible, even though a route which is, at best, "back door" in nature." Nugent, 639 S.W.2d at 764. Sherri's testimony was a clear expression of her purported belief and opinion that Mr. Wright was complicit in the drug deal and guilty and it was elicited in a way that can only be called "back door" at best.

One basis of Sherri's conclusion was her opinion that when Mr. Wright said something about the drugs having been in the freezer, he was attempting to induce her to buy the drugs. VR No. 1: 3/11/11; 2:10:45-2:11:55. This too was improper opinion testimony because a witness should not attempt to interpret what another witness meant by what he said. Tamme, 973 S.W.2d at 33-34 (citing Adcock, 702 S.W.2d at 442). Another basis was her opinion on Mr. Wright's mental state. When the prosecutor asked her what she meant when she said Mr. Wright was monitoring the situation, she testified "[h]e was observant, he was right there, he made sure he was listening, he seen everything go on, **it's like he was right there part of it.**" Id. at 2:12:21-2:12:35. This was not only another improper expression of her opinion Mr. Wright was complicit, and thus guilty, but was also improper opinion testimony regarding Mr. Wright's mental

state. Young, 50 S.W.3d at 170 (Generally, a witness may not testify to the mental impressions of another.).

Sherri could testify regarding what she observed. However, she could not testify that she bought drugs from Mr. Wright when she in fact bought them from Sean Records. If she actually believed such, it was her subjective opinion and the prejudice is clear, especially when combined with the fact that Officer Arnsperger had already, and improperly, bolstered and vouched for Sherri by telling jurors she was credible.[14]

Conclusion:

This improper testimony invaded the province of the jury and violated Kentucky case law, the Kentucky Rules of Evidence, and Appellant's rights to be tried by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and his rights to a fair trial, fundamental fairness, and Due Process under the Fifth and Fourteenth Amendments to the United States Constitution. See State v. Kirkman, 155 P.3d 125 (Wash. 2007) (Impermissible opinion testimony is reversible error when such evidence violates the defendant's constitutional right to a jury trial by interfering with the independent determination of the facts by the jury.); See also Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988) (Granting federal habeas corpus relief due to state evidentiary rule violation: police officer essentially testified he believed a defendant was guilty, resulting in the denial of fundamental fairness, thereby violating due process.) (citing Maglaya v. Buchkoe, 515 F.2d 265 (6th Cir. 1975)); see also Payne v. Tennessee, 501 U.S. 808, 825 (1991) (When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause

[14] See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992) (even if individual errors are not, in and of themselves, sufficient to require a reversal, the cumulative effect of the prejudice from multiple errors can require reversal).

provides a mechanism for relief"); Alexander v. Louisiana, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. amend 5 right to a fair trial to the states.); California v. Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (Due process clause affords criminal defendants "fundamental fairness."). See also, Sections 2, 7, and 11 of the Kentucky Constitution

ARGUMENT

V.

RCr 9.74 was violated when the jury used the prosecutor's laptop in the deliberation room to listen to the audio recording of the drug deal.

This issue was preserved in the trial court. VR No. 1: 3/11/11; 3:43:25, 4:47:11, 4:49:40, 4:54:10. After the case had been submitted to them, the jury came into the courtroom to listen to the recording of the drug buy. Id. at 3:45:20. After sending a note out wanting to listen to it further, the court let them use the prosecutor's laptop in the deliberation room to listen to it further. Id. at 4:46:45-4:56:38. The judge stated on the record he was going to allow the jury to use the prosecutor's laptop in the jury room and even stated on the record that the jury was going back to the jury room to use the prosecutor's laptop when they did so. (VR No. 1: 3/11/11; 4:55:40, 4:56:38). Defense counsel had objected based on RCr 9.74. VR No. 1: 3/11/11; 3:43:25, 4:47:11, 4:49:40, 4:49:46, 4:54:10.

RCr 9.74 states:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

In Mills v. Commonwealth, 44 S.W.3d 366, 371-72 (Ky. 2001), this Court reversed a trial court for violating RCr 9.74. In Mills, the Commonwealth sought to admit taped statements of witnesses who testified. Id. at 371. The Commonwealth did not want the tapes played during trial, but did want the tapes available for the jury during deliberations. Id. The trial court ruled the tapes were admissible, subject to the Commonwealth laying a proper foundation. Id. The trial court redacted portions of the tapes objected to by the defense, but still made the redacted tapes available for the jury, which the jury asked to review. Id. On appeal, this Court stated RCr 9.74 "was clearly violated when the jury was allowed to play the tapes in the privacy of the jury room. The tapes were not played in open court. Neither Mills nor his counsel was present when the tapes were played..." Id.

The Mills Court referred to Lett v. Commonwealth, 144 S.W.2d 505 (Ky. 1940), to which the case at bar may be more akin. The Lett Court found reversible error when the trial court allowed the jury to hear a court reporter read a portion of a witness's statement without notifying defense counsel. Id. at 372. The Lett Court held that this violated a then-current criminal rule that provided:

> After the jury retires for deliberation, if there be a disagreement between them as to any part of the evidence, * * * they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties.

Id., quoting Lett, 144 S.W.2d at 509 (asterisks in the original). In holding the error to be reversible even though there was no allegation of prejudice, the Lett Court stated:

> It has been recognized since time immemorial, under the common law, the federal and our Constitution, that when one is charged with a felony the trial must be had in the presence of the accused, and that the accused has the right to be heard by himself and counsel. The Code provision makes it quite plain that if there be disagreement as to evidence-which must have existed here, else no reason for the

> request-any elucidation must not be had without notice to counsel. The reason is obvious, and particularly applicable here, where the witness had given contradictory testimony. It is beyond our power to make a rational guess as to the effect of the failure to have re-read the contradictory evidence.

Id. (quoting Lett, 144 S.W.2d at 509). "Allowing the jury to hear these tapes in the manner described above was an error of serious constitutional magnitude." Id.

In the case at bar, the trial court erred when it allowed the jury to listen to the audio recording without any restrictions in the privacy of the deliberation room. This error was especially prejudicial because they took the prosecutor's laptop with them into the deliberation room with no admonishment not to look into other files on the laptop and no admonishment not to use the internet. When discussing giving jurors the laptop, the prosecutor even said:

> "I guess the problem with the laptop is, is, I don't think they would do it intentionally, but I can't promise what's on the laptop, I don't want them accessing something that would be inadmissible, I don't know that there's any stuff pertinent to this trial on it."

VR No. 1: 3/11/11; 3:43:25-3:45:20.

This error violated RCr 9.74 and the above mentioned case law. The Court of Appeals agreed and reversed Mr. Wright's case because, over defense counsel's objections, the jury was allowed unfettered access to the prosecutor's laptop in the jury room to listen to an audio recording that had been played during trial. The Court of Appeals stated in part:

> Allowing the jury to take the prosecutor's laptop into the deliberation room with unfettered access to the laptop's files, as well as possible internet connection, was an abuse of the trial court's discretion. This situation is not as straightforward as sending a paper exhibit or tape cassette into the deliberation room, perhaps with portable speakers or another type of listening device. Here, the Commonwealth's laptop, which likely contained a sea of inadmissible and irrelevant evidence, was given to the jury to access in the privacy of the deliberation room with not

> even an admonishment not to access any other files or the internet. Giving jurors unrestricted and unmonitored access to a party's laptop, outside of the defendant's presence, is highly improper and the likelihood of prejudice is very high. See McGuire v. Commonwealth, 368 S.W.3d 100, 115 (Ky. 2012) (trial court's replaying of witness' trial testimony outside of defendant's presence was clearly erroneous, but did not amount to palpable error).

Wright v. Commonwealth, Slip Opinion pg. 4-5.

The Commonwealth now contents that the jury could have received the prosecutor's laptop in the deliberation room under RCr 9.72. Commonwealth's Brief pg. 4-5. This is incorrect. RCr 9.72 states: "Upon retiring for deliberation the jury may take all papers and other things received as evidence in the case." **The prosecutor's laptop was never received as evidence in this case.** Thus, RCr 9.72 would not allow the jury to receive it upon retiring for deliberation.

The Commonwealth also cites to Winstead v. Commonwealth, 327 S.W.3d 386 (Ky. 2010), in arguing that reversal should not be granted. Commonwealth's Brief pg. 7-10. In Winstead, the defense moved for a mistrial after it became known that some jurors used their cell phones during penalty phase deliberations. Winstead, 327 S.W.3d at 401. The trial court questioned the jury as a group and the foreperson and some individual jurors acknowledge that some individual jurors had used cell phones during deliberations. Id. The jurors all stated that their cell phone calls were personal in nature, such as checking to make sure children arrived home safely and checking in with work. Id. The jurors represented that none of these calls concerned the case they were trying. Id. This Court found the trial court's handling of the issue sufficient and affirmed the denial of a mistrial. Id.

In the case at bar, the Commonwealth's reliance on Winstead is misplaced. In Winstead, the trial court inquired into the issue and determined that the jurors did not use their cell phones to make calls concerning the case they were trying. Such did not happen in this case. Rather, in the case at bar, the jury was given unfettered access to the prosecutor's laptop, which had not been admitted into evidence, without any admonition as to the proper scope of use of the laptop.

The Commonwealth now also contends that defense counsel's objections were not specific enough. However, the Commonwealth never presented this argument to the Court of Appeals. Any argument from the Commonwealth regarding inadequate preservation should be considered forfeited. It is improper for the Commonwealth to make one argument to the Court of Appeals and then another to this Court. C.f. Jackson v. Commonwealth, 187 S.W.3d 300 (Ky. 2004).

In his motion for discretionary review, the Commonwealth argued that defense counsel's objections to the jury playing the audio recording in the jury room on the prosecutor's laptop and citing RCr 9.74 were not specific enough because defense counsel did not specifically state that he was objecting "to the manner in which the jury received the material." Defense counsel's objections came after the prosecutor suggested letting the jury use his laptop. VR No. 1: 3/11/11; 3:43:25, 4:47:11, 4:49:40. The prosecutor's laptop was the only piece of equipment the parties could think of that could be used to play the recording. Id. at 3:43:25. No CD player could be found in the courthouse. Id. at 4:55:40. By default, defense counsel's objection included objecting to the manner in which the recording would be played by the jury.

Even if inadequately preserved though, reversal should have been granted under RCr 10.26. This error was palpable under RCr 9.74 and 9.72 and the abovementioned case law because, as explained above, the prosecutor's laptop was never introduced into evidence and thus it could not have been received by the jury after the close of evidence. Moreover, even if defense counsel's objections were not as specific as the Commonwealth now feels they should have been, the bottom line is "[c]ommon sense must not be a stranger in the house of the law." Cantrell v. Kentucky Unemployment Insurance Commission, 450 S.W.2d 235, 237 (Ky. 1970). Commonsense dictates that a jury should not be allowed unfettered access to a prosecutor's laptop in the jury room during deliberations. The prosecutor even conceded the laptop may have inadmissible evidence and expressed concern that the jury might access some of it, even unintentionally. (VR No. 1: 3/11/11; 3:43:25-3:45:20, 4:49:40; Wright v. Commonwealth, Slip Opinion pg. 4). We live in a computer age and it is reasonable to conclude that a vast majority of people in this country know how to open files on computers now, and even if some people do not, surely most people in a jury composed of 12 would. A prosecutor's laptop is sure to contain a wealth of information not only about whatever case is at issue, but also about all sorts of other cases. Moreover, giving a jury a laptop gives them free range to search the internet for any number of things including a search of the defendant's name on google or any other search engine.

This error violated RCr 9.74, the above mentioned case law, RCr 9.72, and Mr. Wright's rights to a fair trial and fundamental fairness under the Fifth and Fourteenth Amendments to the United States Constitution.[15] There was not overwhelming evidence

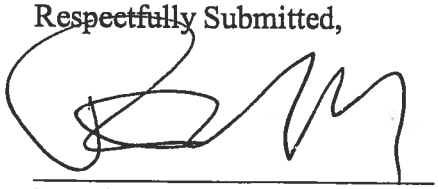
[15] See Alexander v. Louisiana, 406 U.S. 625 (1972) (Due process clause incorporates the U.S. Const. amend 5 right to a fair trial to the states.); California v. Trombetta, 467 U.S. 479, 485 (1984) and

of guilt in this case. This error cannot be proven harmless. Moreover, as explained above, this error was also palpable and seriously affected the fairness of the proceedings and there is a substantial possibility that the result in the case would have been different but for the errors.

CONCLUSION

For the reasons stated herein, reversal for a new trial is still required.

Respectfully Submitted,



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Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (Due process clause affords criminal defendants "fundamental fairness."). See also, Sections 2, 7, and 11 of the Kentucky Constitution.

APPENDIX

Tab Number	Item Description	Record Location
1	Wright v. Commonwealth (2011-CA-000759) (Opinion Reversing and Remanding)	
2	Final Judgment	TR 65-66